

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 5

Docket No. AT-0752-11-0476-I-1

**Alma B. Hinton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

January 17, 2013

Alma B. Hinton, Martinez, Georgia, pro se.

Christopher Ryan Johnson, Esquire, Decatur, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her removal appeal as settled. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision to the extent that it dismissed the appellant's non-age discrimination claims as settled, but we

REMAND the appeal for further adjudication of her age discrimination claim, consistent with this Opinion and Order.¹

BACKGROUND

¶2 The agency removed the appellant based on improper conduct. Initial Appeal File (IAF), Tab 7 at 35-37, 19-20, 17. The appellant filed a Board appeal of her removal, alleging, among other things, that the agency discriminated against her based on age. *Id.*, Tab 1 at 6. She requested a hearing. *Id.* at 4. Prior to the date on which the hearing was to begin, the parties entered into a settlement agreement. *Id.*, Tab 20. The agreement provided, inter alia, that the appellant's removal would be changed to reflect that she resigned effective the date of her removal; that her Official Personnel File would be purged of documents relating to her removal; and that the agency would pay her \$27,000. *Id.* The agreement noted that the appellant was eligible to retire and provided that she should contact Human Resources to begin the retirement process. *Id.* After determining that the Board had jurisdiction over the appeal, that the agreement was lawful on its face and freely reached by the parties, and that they understood the terms and agreed that it was to be enforceable by the Board, the administrative judge dismissed the appeal as settled. *Id.*, Tab 21, Initial Decision at 1-2.

¶3 In her timely filed petition for review, the appellant alleges that the settlement agreement was unlawful or the result of fraud. Petition for Review (PFR) File, Tab 1. She states that she had no choice but to sign the agreement, that the agency representative falsely accused her of being prejudiced, and that he told her that, if she did not sign the agreement, she would lose her retirement. *Id.*

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

at 1, 2. She also alleges that the administrative judge told her that, if the case went to hearing, she would not receive back pay and that her high-3 salary for retirement would be determined at the GS-4 grade level, rather than at the GS-7 grade level, as she believes it should. *Id.* at 1. She suggests that, with his “demands,” the agency representative “took from me rights of Freedom of Speech.” *Id.* at 2. Also, she argues that she was wrongfully removed, *id.* at 3-4, challenging the merits of that action.² *Id.* at 7-8.

ANALYSIS

¶4 A party may challenge the validity of a settlement agreement if she believes that it is unlawful, involuntary, or the result of fraud or mutual mistake. *E.g.*, *Sargent v. Department of Health & Human Services*, [229 F.3d 1088](#), 1091 (Fed. Cir. 2000); *Wade v. Department of Veterans Affairs*, [61 M.S.P.R. 580](#), 583 (1994). To establish that a settlement was fraudulent as a result of coercion or duress, a party must prove that she involuntarily accepted the other party’s terms, that circumstances permitted no other alternative, and that such circumstances were the result of the other party’s coercive acts. *Potter v. Department of Veterans Affairs*, [111 M.S.P.R. 374](#), ¶ 6 (2009); *Candelaria v. U.S. Postal Service*, [31 M.S.P.R. 412](#), 413 (1986). The party challenging the validity of the settlement agreement bears a “heavy burden.” *Asberry v. U.S. Postal Service*, [692 F.2d 1378](#), 1380 (Fed. Cir. 1982). An appellant’s mere post-settlement

² The Clerk of the Board advised the parties that the record on review would close on March 12, 2012. Petition for Review (PFR) File, Tab 2. The agency filed a response to the appellant’s petition on July 17, 2012, requesting that the Board consider its late response because the appellant did not serve her petition on the agency and because the agency representative was on extended active duty with the U.S. Air Force. *Id.*, Tab 4 at 4. The record shows, however, that the Clerk of the Board properly served the agency with the appellant’s petition on February 16, 2012, and that the agency representative only served on active duty from February 12, 2012, until April 13, 2012. *Id.*, Tab 2, Tab 4 at 5. Therefore, the agency has not shown good cause for its delay in filing a response to the appellant’s petition for review, and the Board will not consider it.

remorse or change of heart cannot serve as a basis for setting aside a valid settlement agreement. *Potter*, [111 M.S.P.R. 374](#), ¶ 6; *Thompson v. Department of Veterans Affairs*, [52 M.S.P.R. 233](#), 237 (1992).

¶5 The appellant has failed to present evidence that the agency representative engaged in coercive acts or that the circumstances were such that there was no alternative to accepting the agreement as presented by the agency. Her suggestion that she felt compelled to accept the settlement for fear of losing her retirement is belied by the fact that she was already pursuing her retirement benefits even before the parties undertook settlement negotiations. IAF, Tab 19. She has failed to explain how any of the agency representative's statements during the settlement process denied her free speech. Moreover, she admits that he suggested that she take the agreement to her financial advisor, PFR File, Tab 1 at 2, although she does not indicate whether she did so. We find, therefore, that the appellant has not, by her challenges to the validity of the agreement, met her burden of proving her factual allegations that the settlement agreement was coerced.

¶6 Notwithstanding that the appellant has not, by her claims on review, established error in the administrative judge's dismissal of her appeal as settled, there remains an issue that merits consideration. The appellant raised an allegation of age discrimination in connection with her removal. IAF, Tab 1 at 6. The administrative judge issued an affirmative defenses order setting out, inter alia, the burden of proof as to age discrimination and directing the appellant to specifically identify the factual basis for her claim. *Id.*, Tab 3 at 8-13. After she failed to respond, the administrative judge issued a second order, affording the appellant additional time to describe her claim in detail. *Id.*, Tab 10. The appellant filed two submissions describing in detail her allegation of age discrimination. *Id.*, Tabs 16, 19. Under the circumstances, the record does not support a finding that the appellant waived her age discrimination claim based on her failure to respond to the administrative judge's initial order regarding the

appellant's affirmative defenses.³ In effect, a finding that she did so would be a dismissal for failure to prosecute, a severe sanction that will only be imposed if necessary to serve the ends of justice. *See Wiggins v. Department of the Air Force*, [113 M.S.P.R. 443](#), ¶¶ 11-14 (2010); *Simon v. Department of Commerce*, [111 M.S.P.R. 381](#), ¶¶ 11-14 (2009). As set forth above, such a severe action is not supported by the record. Nor do we find that the appellant may be considered to have otherwise voluntarily withdrawn or waived her age discrimination claim.

¶7 Before accepting a settlement agreement in an appeal where age discrimination has been alleged, the Board must first verify that the agency has complied with the provisions of the Older Workers Benefit Protection Act of 1990 (OWBPA). *Lange v. Department of the Interior*, [94 M.S.P.R. 371](#), ¶ 5 (2003). Under the OWBPA, a settlement agreement in such an appeal must meet the requirements of [29 U.S.C. § 626\(f\)\(1\)\(A\)-\(E\)](#), and the appellant must be given a reasonable period of time within which to consider the agreement. [29 U.S.C. § 626\(f\)\(1\), \(2\)](#); *Lange*, [94 M.S.P.R. 371](#), ¶ 7. Specifically, [29 U.S.C. § 626\(f\)\(1\)\(A\)-\(E\)](#) provides, regarding waiver, that:

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

³ Moreover, administrative judges must memorialize any waiver of claimed affirmative defenses in the record. *See Gath v. U.S. Postal Service*, [118 M.S.P.R. 124](#), ¶ 11 (2012). The administrative judge made no such determination in this appeal.

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; [and]

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement[.]

[29 U.S.C. § 626](#)(f)(1)(A)-(E).

¶8 The OWBPA applies to the appellant’s age discrimination claim because it was made under “this chapter,” i.e., under 29 U.S.C. chapter 14, the Age Discrimination in Employment Act (ADEA), as amended. See [29 U.S.C. § 626](#)(f)(1); see also [29 U.S.C. § 633a](#)(a) (making the ADEA applicable to executive branch agencies). However, the administrative judge did not make any findings regarding whether the settlement agreement complied with the provisions of the OWBPA before dismissing the appeal as settled.

¶9 Based on our review of the settlement agreement, we find that it does not comply with the OWBPA. Specifically, the written settlement agreement did not specifically refer to waiver of claims arising under the ADEA, and there is no indication that the agency ever advised the appellant in writing to consult with an attorney prior to entering into the agreement. See [29 U.S.C. § 626](#)(f)(1)(B), (E); *Schwartz v. Department of Education*, [113 M.S.P.R. 601](#), ¶¶ 11-12 (2010); *Harris v. Department of the Air Force*, [98 M.S.P.R. 261](#), ¶ 7 (2005). The agency’s failure to comply with the OWBPA invalidated the appellant’s waiver of her age discrimination claim. See *Schwartz*, [113 M.S.P.R. 601](#), ¶ 12. Therefore, the appeal must be remanded for further adjudication of that claim only; the appellant’s waiver of her other, non-age discrimination claims remains in effect. See *id.*, ¶ 13.

ORDER

¶10 The appeal is hereby REMANDED for further adjudication of the appellant’s age discrimination claim. The parties are advised that, on remand, the merits of the removal action are not at issue, except to the extent that the

administrative judge determines that it is necessary to consider them in deciding whether the removal was based on age discrimination. *See Lange*, [94 M.S.P.R. 371](#), ¶ 13.⁴

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

⁴ In a pleading filed well after the record closed in this matter, the appellant has asserted error in the Office of Personnel Management's (OPM) calculation of her retirement annuity, and she asks the Board to correct the error. PFR File, Tab 6. Any such appeal of that issue is premature unless and until the appellant first receives an initial decision from OPM, requests reconsideration, and receives a final decision from OPM. *See* [5 C.F.R. §§ 831.109](#)-.110; §§ 841.305-.308, as appropriate.